

# **NORTH DAKOTA PETROLEUM TANK RELEASE COMPENSATION FUND**

## **GUIDELINES FOR PETROLEUM TANK OWNERS**

Revised 04-06-06

### **PETROLEUM STORAGE TANK CLEANUP COSTS**

When a petroleum release occurs, you must **immediately** **contact** the **North Dakota State Health Department (Health Department)**, Underground Storage Tank (UST) Program at (701) 328-5166 or the Division of Municipal Facilities For Aboveground Tank Releases at (701) 328-5210, **and the State Petroleum Tank Release Compensation Fund (Fund)** at (701) 328-9600. The contact person is Jeff Bitz, Administrator. Jeff's email address is jbitz@nd.gov.

**The Fund and the Health Department must be notified thirty (30) days before beginning removal, change in service or permanent closure of an underground storage tank.** This allows the Health Department and the Fund to coordinate their schedule to be at your site for the tank removal. North Dakota's UST Program is required to go to all sites during a tank removal to determine if there is contamination.

**The Fund only reimburses for “reasonable and necessary” cleanup expenses.** In order to determine what expenses are “reasonable and necessary”, the tank owner or operator is required to obtain three bids for the removal of an UST. The bids need to be broken out into unit costs for each piece of equipment or laborer. This can be done by the tank owner or operator requesting bids according to the Fund's Excavation Expense Worksheet (SFN 17331 (01-2006)). Any additional work will be reimbursed according to unit costs on the original bid.

### **HIRING AN EXCAVATION CONTRACTOR:**

Prior to hiring an excavation contractor for removal or upgrading work:

1. Check with the Fund to make sure you are eligible to receive reimbursement.
2. Hire a reputable contractor. Ask other owners or operators about contractors they have hired.
3. Obtain written bids from three different contractors. Make sure the contractor bids on specific “unit costs” (backhoe, loader, trucking, etc.). Use the Excavation Expense Worksheet SFN#17331 (01-2006). Make sure they list:
  - a. Unit costs by the hour or cubic yard as requested on worksheet;
  - b. The tasks they will perform;
  - c. The cost of each piece of equipment (by the cubic yard);
  - d. The number of employees they will have on the site (normally 1 foreman and 1 laborer is all that is necessary);
  - e. The labor rate they charge;
  - f. The trucking charges for hauling the contaminated soil (by the cubic yard);

- g. Any other information you feel is essential for this work being performed; and
- h. Mobilization expense.

**All claims for payment are subject to the availability of funds in the Fund and must be submitted no later than one year after each specific unit of work has been completed to be eligible.**

**The following expenses are not eligible for reimbursement by the Fund:**

- a. The cost of replacement, repair, and maintenance of affected tanks and associated piping.
- b. Pumping out of any product, including water, from any tanks, which need to be removed.
- c. The cost of upgrading existing affected tanks and associated piping.
- d. The loss of income, profits, or petroleum products.
- e. Decreased property value.
- f. Bodily injuries or property damages except for injuries or damages suffered by third parties.
- g. Attorney's fees.
- h. Costs associated with preparing, filing, and prosecuting an application for reimbursement.
- i. The costs of making improvements to the facility beyond those that are required for corrective action.
- j. Any cleanup costs resulting from negligence or misconduct on the part of the owner or operator.
- k. Costs in excess of those considered reasonable by the Fund.
- l. Fines, penalties imposed by order of federal, state, or local government.
- m. Finance charges, interest charges, or late payment charges.

**OVERSEEING THE EXCAVATION CONTRACTOR:**

1. Take charge of the operation. You need to manage the contractor and don't let the contractor manage you. The Fund will assist you as much as possible.
  - Be aware of the tasks the contractor is doing. Question them on the need to perform certain tasks you feel they might be overdoing.
2. Make sure the contractor keeps a daily log of activities. This protects you from being overcharged. It will also provide information for the Fund should questions arise regarding "reasonable and necessary" costs.
3. Make sure you understand the excavation contractor's bill. You need to know what the specific expense charges are and how they are determined. This is essential in order to keep the costs of the cleanup under control. You need to make sure the bills you

receive match the bid or contract they submitted. It is the tank owner's responsibility to verify the charges are legitimate and correct.

4. **You must visit with the Health Department regarding onsite treatment of soil or landfarming in comparison to hauling the contaminated soil to a landfill. If you do not, the Fund will only be responsible for reimbursement of what it would have cost to landfarm the contaminated soil.** They need to approve the disposal or treatment method of the contaminated soil. The Fund will assist you in every way possible regarding onsite treatment or landfarming of the contaminated soil rather than hauling it to a landfill. If handled properly, this can be a very large cost saving to you and the Fund.

#### **ENVIRONMENTAL CONSULTANTS:**

1. If you have a petroleum release that causes contamination, the Health Department may require you to have a **site assessment** performed. This will need to be done by a qualified environmental consultant firm. The Fund only reimburses for consultant expenses when the Health Department requires it.
2. Obtain **three separate bids**. The Fund has specific worksheets (SFN 18731 (01-2002)) for bidding out by unit cost. We recommend you use our worksheet when requesting bids. This helps you understand the bid (shows specific hourly costs) and keeps all consultant firms bidding the same procedure.
3. For bidding purposes a minimum "site assessment" should include:
  - a. A workplan explaining the procedures, type and amount of work to be done. This needs to be pre-approved by the Health Department.
  - b. Soil Borings – three soil borings at a site is generally sufficient. If the consultant believes more soil borings are necessary, approval should be obtained from the Health Department while the contractor is onsite with his drilling rig.
  - c. If petroleum contamination is encountered to the ground water table at any of these borings, they may need to be converted to ground water monitoring wells. If the consultant feels more than three wells are needed to delineate the ground water flow and contamination extent, they will need to get prior approval from the Health Department for additional work.
  - d. One soil sample from each boring and one water sample from each monitoring well is usually sufficient to determine the extent and degree of contamination.
  - e. The consultant firm must complete a report and submit it to the tank owner. This report needs to be forwarded to the Health Department for their review.
  - f. Once the report is submitted, your initial site assessment is finished.  
If more work needs to be done, the Health Department will notify you.

When all the work is completed, please submit the necessary receipts and the completed Excavation and Consultant Worksheets to the Fund. The Fund reviews your expenses and will reimburse you for your eligible "reasonable and necessary" cleanup expenses.

The Fund needs a copy of your cancelled check showing proof of payment of your \$5,000 deductible and your 10% co-payment amount.

## **SUMMARY OF PETROLEUM TANK RELEASE COMPENSATION FUND**

The Petroleum Tank Release Compensation Fund (Fund) was originally established by the 1989 Legislature to financially assist petroleum tank owners by reimbursing them for reasonable cleanup costs caused by a petroleum release. Hopefully, the following information will answer any questions or concerns you may have.

The annual renewal date is July 1st of every year.

The annual registration fee is \$50.00 for each underground storage tank (UST) and \$50.00 for each aboveground storage tank (AST).

If a tank owner plans to remove any tanks, they should check with the Fund to make sure all their tanks are registered. **ALL REQUIRED TANKS NEED TO BE REGISTERED AND COMPLY WITH STATE AND FEDERAL REGULATIONS TO BE ELIGIBLE TO PARTICIPATE.**

It is **mandatory** for all **tank owners** to **register** their **tank(s)** with the Fund and pay the necessary registration fee. If a tank owner does not register their tank(s) and pay the annual registration fee from April 1991 (or from the date a new tank was installed if it was after April 1991), not only will they be ineligible to receive reimbursement from the Fund, but they will be in violation of this law, which is a Class B Misdemeanor. The names of any entity or individual known to be in violation will be reported to the State's Attorney.

The eligible tank owner shall be reimbursed for 90 percent of the **NECESSARY AND REASONABLE COSTS** between \$5,000 and \$155,000 of expense they incur for cleanup of contaminated soil or third-party liability, caused by a petroleum release. Thereafter, the Fund will reimburse 100 percent of the **NECESSARY AND REASONABLE COSTS** up to \$1,000,000. An eligible tank owner will not be liable for more than \$20,000 out-of-pocket expenses for any one release.

**Tanks that DO NOT qualify** to be registered with the Fund are listed below:

1. Federal government tank
2. Portable tank
3. Pipeline facility

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4. An underground farm or residential tank of 1,100 gallons or less used for non-commercial purposes
5. An aboveground farm or residential tank of any size used for non-commercial purposes. However, the owner may, upon application and payment of appropriate fees, join the Fund
6. Heating fuel tank for use on the premises where stored
7. Propane tank
8. A liquid trap or gathering operation
9. Surface impoundment, pit, pond or lagoon
10. Flow-through process tank
11. A tank in a basement, cellar, shaft or tunnel if upon or above the surface of the floor
12. A tank used to fuel rail locomotives or surface coal mining equipment
13. A tank with a capacity under one thousand three hundred twenty gallons used to store lubricating oil

Please make checks payable to the PETROLEUM TANK RELEASE COMPENSATION FUND and send with the completed REGISTRATION FORM (BOTH SIDES) to:

Petroleum Tank Release Compensation Fund  
1701 South 12<sup>th</sup> Street  
Bismarck, ND 58504-6644

For further details regarding eligibility and procedures, contact Jeff Bitz at 701-328-9606 or email us at [ndfire&tornado@nd.gov](mailto:ndfire&tornado@nd.gov).

PLEASE NOTE, TO REPORT REMOVAL OF UNDERGROUND STORAGE TANKS OR A PETROLEUM RELEASE, CONTACT GARY BERRETH, DIVISION OF WASTE MANAGEMENT, STATE DEPARTMENT OF HEALTH AND CONSOLIDATED LABORATORIES AT 701-328-5166.

## **CHAPTER 23-37**

### **PETROLEUM RELEASE REMEDIATION**

**23-37-01. (Effective through July 31, 2011) Declaration of purpose.** The purpose of this chapter is to establish:

1. A petroleum tank release compensation fund; and
2. A petroleum tank release compensation advisory board authorized to review claims against the fund.

**23-37-02. (Effective through July 31, 2011) Definitions.** As used in this chapter, unless the context otherwise requires:

1. "Actually incurred" means, in the case of corrective action expenditures, that the owner, the operator, the landowner, an insurer, or a contractor hired by the owner, operator, or the landlord has expended time and materials and that only that person is receiving reimbursement from the fund.
2. "Administrator" means the manager of the state fire and tornado fund.
3. "Board" means the petroleum release compensation board.
4. "Commissioner" means the insurance commissioner.
5. "Corrective action" means an action required by the department to minimize, contain, eliminate, remediate, mitigate, or clean up a release, including any remedial emergency measures. The term does not include the repair or replacement of equipment or preconstructed property.
6. "Dealer" means any person licensed by the tax commissioner to sell motor vehicle fuel or special fuels within the state.
7. "Department" means the state department of health.
8. "Fund" means the petroleum release compensation fund.
9. "Location" means a physical address or site that has contiguous properties. Noncontiguous properties within a municipality or other governmental jurisdiction are considered separate locations.
10. "Operator" means any person in control of, or having responsibility for, the daily operation of a tank under this chapter.
11. "Owner" means any person who holds title to, controls, or possesses an interest in the tank before the discontinuation of its use.
12. "Person" means an individual, trust, firm, joint stock company, federal agency, corporation, state, municipality, commission, political subdivision of a state, or any interstate body. The term also includes a consortium, a joint venture, a commercial entity, and the United States government.
13. "Petroleum" means any of the following:
  - a. Gasoline and petroleum products as defined in chapter 19-10.
  - b. Constituents of gasoline and fuel oil under subdivision a.

- c. Oil sludge and oil refuse.
14. "Portable tank" means a storage tank along with its piping and wiring that is not stationary or affixed, including a tank that is on skids.
  15. "Release" means any unintentional spilling, leaking, emitting, discharging, escaping, leaching, or disposing of petroleum from a tank into the environment whether occurring before or after the effective date of this chapter, but does not include discharges or designed venting allowed under federal or state law or under adopted rules.
  16. "Tank" means any one or a combination of containers, vessels, and enclosures, whether aboveground or underground, including associated piping or appurtenances used to contain an accumulation of petroleum. The term does not include:
    - a. Tanks owned by the federal government.
    - b. Tanks used for the transportation of petroleum.
    - c. A pipeline facility, including gathering lines, regulated under:
      - (1) The Natural Gas Pipeline Safety Act of 1968.
      - (2) The Hazardous Liquid Pipeline Safety Act of 1979.
      - (3) An interstate pipeline facility regulated under state laws comparable to the provisions of law in paragraph 1 or 2.
    - d. An underground farm or residential tank with a capacity of one thousand one hundred gallons [4163.94 liters] or less or an aboveground farm or residential tank of any capacity used for storing motor fuel for noncommercial purposes. However, the owner of an aboveground farm or residential tank may, upon application, register the tank and be eligible for reimbursement under this chapter.
    - e. A tank used for storing heating oil for consumptive use on the premises where stored.
    - f. A surface impoundment, pit, pond, or lagoon.
    - g. A flowthrough process tank.
    - h. A liquid trap or associated gathering lines directly related to oil or gas production or gathering operations.
    - i. A storage tank situated in an underground area such as a basement, cellar, mine working, drift, shaft, or tunnel if the storage tank is situated upon or above the surface of the floor.
    - j. A tank used for the storage of propane.
    - k. A tank used to fuel rail locomotives or surface coal mining equipment.
    - l. An aboveground tank used to feed diesel fuel generators. Upon application, the owner or operator of an aboveground tank used to feed diesel fuel generators may register the tank and is eligible for reimbursement under this chapter.
    - m. A portable tank.



- n. A tank with a capacity under one thousand three hundred twenty gallons [4996.728 liters] used to store lubricating oil.
17. "Tank integrity test" means a test to determine that a tank is sound and not leaking. For an underground tank, the term means a certified third-party test that meets environmental protection agency leak detection requirements. For an aboveground tank, the term means a test conducted according to steel tank institute SP 001 or American petroleum institute 653.
18. "Third party" means a person who is damaged by the act of a registered owner, operator, or dealer requiring corrective action or a person who suffers bodily injury or property damage caused by a petroleum release.

**23-37-03. (Effective through July 31, 2011) Petroleum release compensation board.**

The petroleum release compensation advisory board consists of five members appointed by the governor, three of whom are active in petroleum marketing, one of whom is active in the petroleum, crude oil, or refining industry, and one of whom is active in the insurance industry. A member active in petroleum marketing must be appointed from a list of three recommended by the North Dakota retail petroleum marketers association. A member active in the petroleum, crude oil, or refining industry must be appointed from a list of three recommended by the North Dakota petroleum council. A member active in the insurance industry must be appointed from a list of three recommended by the North Dakota professional insurance agents association. Members must be appointed to terms of three years with the terms arranged so that the term of at least one member, but no more than two members, expires June thirtieth of each year. A member shall hold office until a successor is duly appointed and qualified. Each member of the board is entitled to receive sixty-two dollars and fifty cents per diem for each day actually spent in the performance of official duties, plus mileage and expenses as are allowed to other state officers.

**23-37-04. (Effective through July 31, 2011) Administration of fund - Staff.** The administrator shall administer the fund according to this chapter. The administrator shall convene the board as may be necessary to keep the board apprised of the fund's general operations. However, the board shall meet at least once each half of each calendar year to review and to advise the administrator regarding the administration of the fund, the fund's general operations, and to hear and decide denials of claims by the administrator which may be appealed to the board, and to discuss all claims against the fund. The administrator may employ any assistance and staff necessary to administer the fund within the limits of legislative appropriation. A claimant aggrieved by a decision of the administrator regarding a claim upon the fund may appeal the decision to the board. The board may sustain, modify, or reverse the decision of the administrator. The claimant or the administrator may appeal the board's decision to the commissioner. The decision of the commissioner may be appealed under chapter 28-32.

**23-37-05. (Effective through July 31, 2011) Adoption of rules.** The administrator shall adopt rules regarding the practices and procedures of the fund, the form and procedure for applications for compensation from the fund, procedures for investigation of claims, procedures for determining the amount and type of costs that are eligible for reimbursement from the fund, procedures for persons to perform services for the fund, procedures for appeals to the board by claimants aggrieved by an adverse decision of the administrator, and any other rules as may be appropriate to administer this chapter.

**23-37-06. (Effective through July 31, 2011) Release discovery.** If the department has reason to believe a release has occurred, it shall notify the administrator. The department shall direct the owner or operator to take reasonable and necessary corrective actions as provided under federal or state law or under adopted rules.

**23-37-07. (Effective through July 31, 2011) Owner or operator not identified.** The department may cause legal action to be brought to compel performance of a corrective action if an identified owner or operator fails or refuses to comply with an order of the department, or the

department may engage the services of qualified contractors for performance of a corrective action if an owner or operator cannot be identified.

**23-37-08. (Effective through July 31, 2011) Imminent hazard.** Upon receipt of information that a petroleum release has occurred which may present an imminent or substantial endangerment of health or the environment, the department may take such emergency action as it determines necessary to protect health or the environment.

**23-37-09. (Effective through July 31, 2011) Duty to notify.** This chapter does not limit any person's duty to notify the department and to take action related to a release. However, payment for corrective actions required as a result of a petroleum release is governed by this chapter.

**23-37-10. (Effective through July 31, 2011) Providing of information.** Any person whom the administrator or the department has reason to believe is an owner or operator, the owner of real property where corrective action is ordered to be taken, or any person who may have information concerning a release shall, if requested by the administrator or the department, or any member, employee, or agent of the administrator or the department, furnish to the administrator or the department any information that person has or may reasonably obtain that is relevant to the release.

**23-37-11. (Effective through July 31, 2011) Examination of records.** Any employee of the administrator or the department may, upon presentation of official credentials:

1. Examine and copy books, papers, records, memoranda, or data of any person who has a duty to provide information to the administrator or the department under section 23-37-10; and
2. Enter upon public or private property for the purpose of taking action authorized by this section, including obtaining information from any person who has a duty to provide the information under section 23-37-10, conducting surveys and investigations, and taking corrective action.

**23-37-12. (Effective through July 31, 2011) Responsibility for cost.** The owner or operator is liable for the cost of the corrective action required by the department, including the cost of investigating the releases. This chapter does not create any new cause of action for damages on behalf of third parties for release of petroleum products against the fund or licensed dealers.

**23-37-13. (Effective through July 31, 2011) Liability avoided.** No owner or operator may avoid liability by means of a conveyance of any right, title, or interest in real property or by any indemnification, hold harmless agreement, or similar agreement. However, this chapter does not:

1. Prohibit a person who may be liable from entering into an agreement by which the person is insured or is a member of a risk retention group, and is thereby indemnified for part or all of the liability;
2. Prohibit the enforcement of an insurance, hold harmless, or indemnification agreement; or
3. Bar a claim for relief brought by a person who may be liable or by an insurer or guarantor, whether by right of subrogation or otherwise.

**23-37-14. (Effective through July 31, 2011) Other remedies.** This chapter does not limit the powers of the administrator or department, or preclude the pursuit of any other administrative, civil, injunctive, or criminal remedies by the administrator or department or any other person. Administrative remedies need not be exhausted in order to proceed under this

chapter. The remedies provided by this chapter are in addition to those provided under existing statutory or common law.

**23-37-15. (Effective through July 31, 2011) Revenue to the fund.** Revenue from the following sources must be deposited in the state treasury and credited to the fund:

1. Any registration fees collected under section 23-37-17;
2. Any money recovered by the fund under section 23-37-23, and any money paid under an agreement, stipulation, or settlement;
3. Any interest attributable to investment of money in the fund; and
4. Any money received by the administrator in the form of gifts, grants, reimbursements, or appropriations from any source intended to be used for the purposes of the fund.

**23-37-16. (Effective through July 31, 2011) Penalty.** A tank owner violating section 23-37-17 is guilty of a class B misdemeanor unless another penalty is specifically provided.

**23-37-17. (Effective through July 31, 2011) Registration fee.**

1. An owner or operator of a tank shall pay an annual registration fee of fifty dollars for each aboveground or underground tank owned or operated by that person. If on the first day of July in any year the amount of money in the petroleum release compensation fund is less than six million dollars, the annual registration fee of fifty dollars is increased to one hundred dollars. If on the first day of July in any year the amount of money in the petroleum release compensation fund is five million five hundred thousand dollars or more and the annual registration fee has been increased to one hundred dollars, the fee must be reduced to fifty dollars. Annual registration fees must be reduced to five dollars if on the first day of July in any year the amount of money in the fund exceeds nine million dollars. Annual registration fees must continue at the fee of five dollars until the money in the fund does not exceed nine million dollars.
2. An owner or operator of an existing tank that is discovered at a location that currently and previously has had tanks registered with the fund on or before July 1, 2007, shall pay seventy-five dollars for each aboveground tank and one hundred twenty-five dollars for each underground tank owned or operated by that person for each previous year that the tank was required to be registered for which a fee was not paid. The payment includes the fees and the penalty for the failure to register.
3. An owner or operator of an existing tank at a location that was not previously and continuously registered with the fund, whether the registration was required by law or not, on or before July 1, 2007, must provide the fund with a phase two environmental study conducted by a qualified firm according to American society for testing materials standards. A tank integrity test must also be performed. The environmental study and tank integrity test must be reviewed by the commissioner along with the application for registration with the fund. If the commissioner rejects the application, the applicant is denied eligibility to the fund. However, if the site is remediated and the leaking tank is replaced, the applicant may reapply for registration with the fund. A new installation that is using a used tank must provide tank integrity test results for the used tank. Use of a synthetic liner in an aboveground dike system negates the need for a tank integrity test. The owner or operator of a new tank at a new site or a new tank at an existing site that had a tank registered at the site previously need only pay the required fees for registration with the fund.

4. If accepted for registration with the fund, the owner or operator of the tank shall pay seventy-five dollars for each aboveground tank and one hundred twenty-five dollars for an underground tank for each underground tank for each previous year that the tank was required to be registered for which a fee was not paid, regardless of ownership in each of those years.
5. The registration fees collected under this section must be paid to the fund administrator for deposit in the state treasury for the dedicated credit to the petroleum release compensation fund.

**23-37-18. (Effective through July 31, 2011) Reimbursement for corrective action.**

1. The administrator shall reimburse an eligible owner or operator for ninety percent of the costs of corrective action, including the investigation, which are greater than five thousand dollars and less than one million dollars per occurrence and two million dollars in the aggregate. An eligible tank owner or operator may not be liable for more than twenty thousand dollars out-of-pocket expenses for any one release. A reimbursement may not be made unless the administrator determines that:
  - a. At the time the release was discovered the owner or operator and the tank were in compliance with state and federal rules and rules applicable to the tank, including rules relating to financial responsibility which were in effect at the time of the release;
  - b. The department was given notice of the release as required by federal and state law;
  - c. The owner or operator has paid the first five thousand dollars of the cost of corrective action; and
  - d. The owner or operator, to the extent possible, fully cooperated with the department and the administrator in responding to the release.
2. The fund shall compensate third parties for corrective action taken for a petroleum release if the provisions of subdivisions a, b, c, and d of subsection 1 were met at the time the release was discovered. Compensation for third-party corrective action includes compensation for costs incurred in returning the real estate to that level deemed duly remediated by the department.
3. The fund shall reimburse the tank owner, operator, or dealer for bodily injuries to a third party caused by a petroleum release if the provisions of subdivisions a, b, c, and d of subsection 1 were met at the time the release was discovered in an amount determined by:
  - a. Findings reduced to judgment in federal or state district court within the state of North Dakota or such other court having jurisdiction over the matter in a proceeding in which the fund has been made a party;
  - b. Findings by an arbitration panel agreed upon in writing by the parties in a proceeding in which the fund has been made a party; or
  - c. A written settlement entered into by the parties in which the commissioner or the commissioner's agent has participated. The settlement must be reviewed and approved by the commissioner.
4. In any civil action against the owner, operator, or dealer for damages resulting from a petroleum release, if the pre-leak condition of real estate is an issue and if there is no reasonable means of determining the pre-leak condition of real estate, the

condition is that which exists at the time the department determines the real estate has been duly remediated.

5. The fund may not compensate for attorney's fees of owners, operators, or dealers, nor may the fund compensate for exemplary damages, criminal fines, or administrative penalties.
6. A third party accepting monetary compensation directly from the fund for damages due to a release caused by a tank owner, operator, or dealer covered by the fund is deemed to have waived any cause of action against the fund or against the tank owner, operator, or dealer.
7. The fund shall reimburse the department for all costs, attorney's fees, and other legal expenses relating to administrative and adjudicative proceedings under this chapter and any subsequent legal proceeding. Any monies reimbursed must be deposited in the department's operating fund in the state treasury and must be spent subject to appropriation by the legislative assembly.

**23-37-19. (Effective through July 31, 2011) Application for reimbursement.** Any owner or operator who is a first-party claimant who proposes to take corrective action or has undertaken corrective action in response to a release, the time of such release being unknown, may apply to the administrator for partial or full reimbursement under section 23-37-18. An owner or operator who is a first-party claimant may be reimbursed only for costs incurred after July 1, 1989, even if the releases were discovered before July 1, 1989, up to the maximum of twenty-five thousand dollars per location.

**23-37-20. (Effective through July 31, 2011) Administrator to determine costs.** A reimbursement for corrective actions taken by an owner, operator, or dealer may not be made from the fund until the administrator has determined that the costs for which reimbursement is requested were actually incurred and were reasonable. All necessary loss adjustment expenses must be included as a component of the loss and must be paid out of the fund.

**23-37-21. (Effective through July 31, 2011) Liability of responsible person.** The right to apply for reimbursement and the receipt of reimbursement does not limit the liability of an owner or operator for damages or costs incurred as the result of a release.

**23-37-22. (Effective through July 31, 2011) Reimbursement not subject to attachment.** The amount of reimbursement to be paid for corrective action that was done by a third party is not subject to legal process or attachment if actually paid to a third party who performed the corrective action.

**23-37-23. (Effective through July 31, 2011) Recovery of expenses.** Any reasonable and necessary expenses incurred by the fund, which exceed the coverage limits provided by section 23-37-18, in taking a corrective action, including costs of investigating a release, and in taking legal actions may be recovered in a civil action in district court brought by the administrator against an owner or operator. The certification of expenses by an approved agent of the fund is prima facie evidence that the expenses are reasonable and necessary. Any expenses that are recovered under this section must be deposited in the fund.

**23-37-24. (Effective through July 31, 2011) Costs exceeding reimbursement.** If the cost of any extraordinary authorized action under this chapter exceeds amounts awarded to the administrator or the department from the federal government, the administrator may pay the department the cost of the corrective actions, including the cost of investigating a release, if the board finds that the cause was a petroleum substance, that an adequate amount exists in the fund to pay for the corrective action, that the occurrence was extraordinary in scope and size, and that a danger to the health and safety of citizens exists.

**23-37-25. (Effective through July 31, 2011) Coordination of benefits.** If an owner or operator has an insurance policy that provides the same coverage as the fund, the administrator

of the fund shall pay the share of the covered loss or damage for which the fund is responsible. The share that must be paid from the fund is equal to the proportion that the applicable limit of coverage under the fund bears to the limits of insurance of all insurance coverage on the same basis.

**23-37-26. (Effective through July 31, 2011) Third-party damages - Participation in actions and review of settlements.**

1. An owner or operator who is sued for damages resulting from a release shall notify the administrator within fourteen days of being served with a summons and complaint. The owner or operator shall also advise the administrator if any insurer is defending the owner or operator and provide to the administrator the name of that insurer.
2. An owner or operator who, before litigation, enters into negotiations with a third party who claims to have been damaged by a release, or who receives a demand for payment of damages to a third party who claims to have been damaged by a release, shall notify the administrator within fourteen days of the demand or the negotiations.
3. The administrator and the board shall review the conduct of any litigation or negotiation. The administrator may not assume any legal costs incurred by the defendant or plaintiff, but may participate in discovery, trial proceedings, or settlement negotiations of either disputed liability or damages that bear on the determination of a plaintiff's damages.
4. The administrator and the board shall review any settlement negotiations to determine the dollar amount of bodily injury or property damage actually, necessarily, and reasonably incurred by third parties which, if paid by the defendant, would be considered eligible costs.

**23-37-27. (Effective through July 31, 2011) Third-party damages - Documentation.**

1. An applicant's payments for third-party damages pursuant to a judgment entered in a court must include copies of the notice of entry of judgment and abstract of costs.
2. An applicant's payments for third-party damages made by agreement in settlement of litigation must include copies of the settlement agreement and such supporting documents as may be required by the administrator.
3. An applicant's payments for third-party damages made by agreement without reference to litigation must include copies of the settlement and such supporting documents as may be required by the administrator.
4. The administrator and the board may require a third party who claims bodily injury to be examined by a physician and require that the physician's report be submitted to the administrator. The administrator may require a third party who claims property damage to permit a property appraiser or claims adjuster retained by the administrator to inspect the property and report to the administrator.
5. The fund shall pay a judgment against an owner, operator, or dealer awarded to a third party as a result of a third-party claim and property damage against an owner, operator, or dealer registered by the fund.
6. The fund shall pay for corrective action as awarded to a third party in any judgment against an owner, operator, or dealer.
7. Liability of the tank owner, operator, dealer, or fund to third parties for corrective action or personal injuries and property damage may not exceed, per person, one

million dollars. Maximum liability of the fund, including all claims by third parties, may not exceed, for any release site, the maximum provided in section 23-37-18.

8. A third party may not bring an action against any owner, operator, or dealer more than three years after a corrective action plan has been approved by the department if the owner, operator, or dealer fully implements and complies with the corrective action plan.
9. In investigating a release site or reviewing the implementation of any corrective action plan approved by the department, the department shall determine whether the release currently threatens public health or the environment. The department shall require, based on science and technology appropriate for the site, any monitoring, remediation, or other appropriate corrective action that is reasonably necessary to protect public health or the environment. The department may require corrective action at a release site at any time after a release occurs.

**23-37-28. (Effective through July 31, 2011) Matching federal funds.** The administrator and the board may annually allow the department a ten percent matching grant for federal leaking underground storage tank funds to be paid out of the fund if the moneys are available and the administrator and the board determine the allowance appropriate.

**23-37-29. (Effective through July 31, 2011) Fund appropriations.** Money in the fund is continuously appropriated to the administrator for the purpose of making reimbursements under this chapter.

**23-37-30. (Effective through July 31, 2011) Investment of fund.** Investment of the fund is under the supervision of the state investment board in accordance with chapter 21-10. The commissioner may purchase a contract for reinsurance of any risk to be paid by the fund. The administrator may investigate the purchase of insurance that reimburses an owner or operator for property damage claims by third parties other than claims for costs of corrective action.

## CHAPTER 45-10-02 GENERAL PROVISIONS

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**45-10-02-01. Definitions.** For the purposes of this chapter, the following definitions apply in addition to the definitions set forth in section 2 of chapter 299 of the 1991 Session Laws:

1. "Antifreeze" is not a petroleum product.
2. "Farm tank" means a tank located on a tract of land devoted to the production of crops or for raising animals and associated residences and improvements. A farm tank must be located on the farm property.
3. "Portable tank" means any storage tank, along with its piping and wiring, that is not stationary or affixed including, but not limited to, tanks which are on skids.
4. "Residential tank" means a tank located on property used primarily for dwelling purposes.
5. "Surface impoundment" means a natural topographic depression, manmade excavation, or diked area formed primarily of earthen materials.
6. Storage tanks used for collecting crude oil are considered flowthrough process tanks and are excluded from coverage.

**History:** Effective November 25, 1991; amended effective June 1, 1994.

**General Authority:** NDCC 28-32-02; S.L. 1991, ch. 299, § 5

**Law Implemented:** S.L. 1991, ch. 299

**45-10-02-02. Tank registration.** On an annual basis (fiscal year July first through June thirtieth), the administrator will mail to all prior fund registrants and any other known petroleum tank owners and operators in North Dakota a registration letter and billing notice. The letter will explain the function of the fund and the requirement that the tank owner or operator must have all tanks owned or operated registered and all fees paid prior to a petroleum release in order to be eligible for



reimbursement. In the event of a petroleum release, no payment will be made to an owner or operator of a registered tank unless the owner or operator has complied with all other state and federal regulations regarding petroleum tanks.

**History:** Effective November 25, 1991; amended effective June 1, 1994.

**General Authority:** NDCC 28-32-02; S.L. 1991, ch. 299, § 5

**Law Implemented:** S.L. 1991, ch. 299, § 17

**45-10-02-03. Registration fee.**

1. An annual registration fee is due and payable on July 1, 1991, and on July first of each successive year thereafter. Registration fees must be paid from April 1991, or from the date a new tank was installed if it was after April 1991, to be in compliance with this section. The period of registration must run from July first to June thirtieth to coincide with the fiscal year of North Dakota.
2. No reregistration or fee modification will be made during any registration year when an owner or operator removes a tank or replaces an underground tank with an aboveground tank within a registration year. The renewal billing will reflect the tank status change. However, a prorated registration fee is required for the installation of an additional tank within any registration year.
3. In the event the legislative assembly may make any alterations or modifications of the registration fee, the administrator shall prorate the annual registration fee accordingly.

**History:** Effective November 25, 1991; amended effective June 1, 1994; January 1, 2000.

**General Authority:** NDCC 28-32-02; S.L. 1991, ch. 299, § 5

**Law Implemented:** S.L. 1991, ch. 299, § 17

**45-10-02-04. Notification of release procedures.** Upon receiving notice of a release from the state department of health, the administrator shall:

1. Verify that the tank and all other tanks owned or operated by the operator are registered with the fund.
2. Record the release information in the claim register.
3. If the owner or operator has not registered all of the tanks owned or operated by the operator, send a letter of denial to the owner or operator with a carbon copy to the state department of health and close the file.

4. If all tanks are registered, notify the owner of the fund's claim filing procedures and send the tank owner or operator the fund's tank release guidelines with an application for reimbursement.

**History:** Effective November 25, 1991; amended effective June 1, 1994; August 1, 2000.

**General Authority:** NDCC 28-32-02; S.L. 1991, ch. 299, § 5

**Law Implemented:** S.L. 1991, ch. 299, §§ 10, 19

**45-10-02-05. Procedures for investigation of claims.** In each release investigation, the administrator shall:

1. Examine the location of the release.
2. Interview persons with knowledge of the release.
3. Examine records and documentation concerning the release, including documentation of the corrective action taken and expenses incurred.
4. Prepare a written report determining the validity of the claim and the estimated eligible cleanup costs.
5. Complete other tasks as required.

**History:** Effective November 25, 1991; amended effective August 1, 2000.

**General Authority:** NDCC 28-32-02; S.L. 1991, ch. 299, § 5

**Law Implemented:** S.L. 1991, ch. 299, §§ 18, 20, 23

**45-10-02-06. Reimbursement.**

1. The fund will reimburse only reasonable and necessary cleanup expenses as determined by the administrator in consultation with the state department of health and only if all tanks are properly registered prior to the discovery of the release.
2. No payment will be made from the fund unless a completed application form has been received by the administrator. The application must contain at least the following information:
  - a. Name and address of the owner, operator, or landowner.
  - b. Street or highway description of the petroleum release location.
  - c. The legal description of the release location.
  - d. The substance released.
  - e. The date the release was discovered.

- f. Name, address, and telephone number of the contact person.
  - g. A narrative description of the release.
- 3. Eligible expenses for corrective action include the following:
  - a. Labor.
  - b. Testing.
  - c. Use of machinery.
  - d. Materials and supplies.
  - e. Professional services.
  - f. Expenses incurred by order of federal, state, or local government.
  - g. Any other expenses the administrator and the board deem to be reasonable and necessary to remedy cleanup of the release and satisfy liability to any third party.
  - h. Consultant fees if authorized by the North Dakota state department of health or other federal or state agency approving the cleanup procedures.
- 4. The following will not be considered eligible expenses under this regulation:
  - a. The cost of replacement, repair, and maintenance of affected tanks and associated piping.
  - b. Pumping out of any product, including water, from any tanks which need to be removed.
  - c. The cost of upgrading existing affected tanks and associated piping.
  - d. The loss of income, profits, or petroleum product.
  - e. Decreased property value.
  - f. Bodily injuries or property damages except for injuries or damages suffered by third parties.
  - g. Attorney's fees.

- h. Costs associated with preparing, filing, and prosecuting an application for reimbursement or assistance under this regulation.
  - i. The costs of making improvements to the facility beyond those that are required for corrective action.
  - j. Any cleanup costs resulting from negligence or misconduct on the part of the owner or operator.
  - k. Costs in excess of those considered reasonable by the fund.
  - l. Fines or penalties imposed by order of federal, state, or local government.
  - m. Finance charges, interest charges, or late payment charges.
- 5. To determine what expenses are reasonable and necessary, the owner, operator, or landowner must bid the excavation and consultant work. The lowest bid that meets the requirements of the state department of health will be deemed by the fund to be the reasonable cost for that project. The bid must be submitted according to the fund's excavation and consultant worksheets. Additional work over and above the original bid will be reimbursed according to unit costs on the original bid.
- 6. The administrator may provide partial payments prior to the final determination of the amount of the loss, if it is determined that the cleanup is proceeding according to the proposed workplan of the state department of health for the site assessment. The payment may be made to the owner, operator, or landowner or that person's assigned representative if the appropriate assignment form is submitted to the administrator with appropriate documentation verifying that the work has been completed by the assignee.
- 7. All claims for payment are subject to the availability of funds in the petroleum tank release compensation fund and must be submitted no later than one year after the work has been completed to be eligible.
- 8. Prior to payment for any loss, the owner, operator, or landowner shall subrogate to the fund all rights, claims, and interest which the owner, operator, or landowner has or may have against any party, person, persons, property, corporation, or other entity liable for the subject loss, and shall authorize the fund to sue, compromise, or settle in the name of the owner, operator, or landowner or otherwise, all such claims. The subrogation agreement required by this section must be prescribed and produced by the administrator.
- 9. Reimbursement will be considered when the owner, operator, or landowner has submitted complete excavation or consultant

worksheets along with legible copies of invoices, providing a description of:

- a. The work performed.
  - b. The party who performed the work.
  - c. The location where the work was performed.
  - d. The date the work was performed.
  - e. The unit cost.
  - f. The total.
10. The owner, operator, or landowner must submit, prior to any payment, evidence that the amounts shown on the invoices for which the payment is requested were either paid in full by the owner, operator, or landowner or, if the owner, operator, or landowner has assigned the right to receive payment from the fund, that a contractor hired has expended time and materials for which payment must be made. This must include documentation that the work has been completed by the assignee.
  11. Prior to payment, the administrator must be satisfied that the corrective action taken has met all state, federal, and local laws or regulations and that the corrective action has satisfied public health, welfare, and environmental concerns.

**History:** Effective November 25, 1991; amended effective June 1, 1994; August 1, 2000; December 1, 2001.

**General Authority:** NDCC 28-32-02; S.L. 1991, ch. 299, § 5

**Law Implemented:** S.L. 1991, ch. 299, §§ 18, 20, 23, 24

**45-10-02-06.1. Reimbursement disputes.** If the fund administrator denies or reduces payment to a tank owner, operator, or landowner, the tank owner, operator, or landowner may request a review by the board by filing a written request and supporting documentation with both the administrator and the board within thirty days of receiving a proof of loss. The board shall issue a written decision concerning the issues in dispute within thirty days of receiving the written notice and supporting documentation. If after review by the board a dispute still exists, the claimant or the administrator may appeal the board decision to the commissioner. The decision of the commissioner may be appealed under North Dakota Century Code chapter 28-32.

**History:** Effective August 1, 2000; amended effective December 1, 2001.

**General Authority:** NDCC 28-32-02; S.L. 1991, ch. 299, § 5

**Law Implemented:** S.L. 1991, ch. 299

**45-10-02-07. Third-party damages.** No reimbursement may be made for damage to employees as defined by the North Dakota Workers' Compensation Act or agents of the owner or operator.

**History:** Effective November 25, 1991.

**General Authority:** NDCC 28-32-02; S.L. 1991, ch. 299, § 5

**Law Implemented:** S.L. 1991, ch. 299, §§ 26, 27

**45-10-02-08. Board.** The administrator shall advise the board of the fund's general operations and review claims either through written correspondence, telephone conference calls, or meetings. The board shall meet at least once each half of each calendar year.

**History:** Effective November 25, 1991; amended effective August 1, 2000; December 1, 2001.

**General Authority:** NDCC 28-32-02; S.L. 1991, ch. 299, § 5

**Law Implemented:** S.L. 1991, ch. 299, § 3

**45-10-02-09. Report to legislative assembly and governor.** This report, as required by section 29 of chapter 299 of the 1991 North Dakota Session Laws, must include, but is not limited to, the following information:

1. Total number of releases.
2. Total number of releases denied because of nonregistered tanks.
3. Total number of releases denied because of expenses not exceeding five thousand dollars.
4. Total number of releases investigated by the fund.
5. Total amount paid out for releases and the average payout per release.
6. Brief summary of the fund's operating expenses.
7. Recommended changes, if any, to 1991 House Bill No. 1439.
8. Recommendation to continue or terminate the program.

**History:** Effective November 25, 1991.

**General Authority:** NDCC 28-32-02; S.L. 1991, ch. 299, § 5

**Law Implemented:** S.L. 1991, ch. 299, § 29